

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

JOHN MATHEW	:	CIVIL ACTION
Plaintiff,	:	
	:	
v.	:	
	:	
CARDONE INDUSTRIES, INC.,	:	
Defendant	:	NO. 97-7480
Newcomer, J.		July , 1998

M E M O R A N D U M

Presently before the Court is defendant's Motion for Summary Judgment and plaintiff's response thereto. For the reasons that follow, said Motion will be granted.

A. Background

Plaintiff in this case, John Mathew, claims that defendant Cardone Industries, Inc., a remanufacturer of automobile parts, discriminated against him on the basis of his alleged disability in violation of the Americans with Disabilities Act ("ADA"). Plaintiff began his employment with defendant in October of 1987 in the shipping and receiving department. In July of 1988, plaintiff injured his back in a work-related accident and was unable to return to work until September of the same year. When plaintiff returned to work with certain restrictions due to his injury, including no lifting over ten pounds and working only half-days, defendant offered him a clerical position which complied with these restrictions and which plaintiff accepted. In 1990 plaintiff was promoted to a supervisory position and continued his employment with certain lifting and sitting restrictions without further significant

incident until December of 1995. In December of 1995 plaintiff reinjured his back and did not return to work until March 26, 1996. During this time defendant had reorganized plaintiff's department, and when plaintiff returned to work, he was informed that his job was no longer available. A month later defendant notified plaintiff that it had created a clerical position for plaintiff consisting of similar responsibilities which plaintiff had previously possessed. The hours for this position, however, were from 5:30 a.m. to 2:00 p.m., which required plaintiff to go to work two hours earlier than for his previous position. Plaintiff did not accept the job due to the earlier hours, and subsequently filed the instant action against defendant, claiming that defendant failed to reasonably accommodate his disability and that the purpose of offering a job starting at 5:30 a.m. was to inconvenience plaintiff and cause him to turn the offer down. Defendant now moves for summary judgment against plaintiff.

B. Summary Judgment Standard

A reviewing court may enter summary judgment where there are no genuine issues as to any material fact and one party is entitled to judgment as a matter of law. White v. Westinghouse Elec. Co., 862 F.2d 56, 59 (3d Cir. 1988). The evidence presented must be viewed in the light most favorable to the non-moving party. Id. "The inquiry is whether the evidence presents a sufficient disagreement to require submission to the jury or whether it is so one sided that one party must, as a matter of law, prevail over the other." Anderson v. Liberty

Lobby, Inc., 477 U.S. 242, 249 (1986). In deciding the motion for summary judgment, it is not the function of the Court to decide disputed questions of fact, but only to determine whether genuine issues of fact exist. Id. at 248-49.

The moving party has the initial burden of identifying evidence which it believes shows an absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986); Childers v. Joseph, 842 F.2d 689, 694 (3d Cir. 1988). The moving party's burden may be discharged by demonstrating that there is an absence of evidence to support the nonmoving party's case. Celotex, 477 U.S. at 325. Once the moving party satisfies its burden, the burden shifts to the nonmoving party, who must go beyond its pleadings and designate specific facts, by use of affidavits, depositions, admissions, or answers to interrogatories, showing that there is a genuine issue for trial. Id. at 324. Moreover, when the nonmoving party bears the burden of proof, it must "make a showing sufficient to establish the existence of [every] element essential to that party's case." Equimark Commercial Fin. Co. v. C.I.T. Fin. Servs. Corp., 812 F.2d 141, 144 (3d Cir. 1987) (quoting Celotex, 477 U.S. at 322). Summary judgment must be granted "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." White, 862 F.2d at 59 (quoting Celotex, 477 U.S. at 322).

C. Discussion

The ADA prohibits "discrimination against a qualified individual with a disability because of the disability of such individual." 42 U.S.C. § 12112(a). A "qualified individual with a disability" is an individual with a disability who can perform the essential functions of his employment position with or without reasonable accommodation. 42 U.S.C. § 12111(8).

"Disability" in turn refers to one or more of the following: (1) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (2) a record of having such an impairment; or (3) being regarded as having such an impairment. 42 U.S.C. § 12102(2). An employer discriminates against a qualified individual with a disability when, inter alia, it fails to make reasonable accommodations unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of its business. Gaul v. Lucent Technologies, Inc., 134 F.3d 576, 579 (3d Cir. 1998); 42 U.S.C. § 12112(b)(5)(A). "Reasonable accommodations" in turn refer to, inter alia, "[m]odifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position." 29 C.F.R. § 1630.2(o)(1)(ii). A plaintiff thus presents a prima facie case of discrimination under the ADA by demonstrating (1) that he is a disabled person

within the meaning of the ADA; (2) that he is otherwise qualified to perform the essential functions of the job, with or without reasonable accommodations by the employer; and (3) that he has suffered an adverse employment decision as a result of discrimination. Gaul, 134 F.3d at 580.

Defendant in the instant case contends both that plaintiff does not suffer from a disability within the meaning of the ADA, and that even if plaintiff is deemed to be an individual with a disability, he cannot prevail because defendant did not discriminate against him in that it provided a reasonable accommodation for his alleged disability. Because the Court determines that even if plaintiff were deemed to be an individual with a disability within the meaning of the ADA, defendant made reasonable accommodations for plaintiff's alleged disability and thus did not discriminate against plaintiff, defendant's Motion will be granted.

The instant case presents the Court with a unique and undisputed factual scenario in which the defendant, on its own initiative, created a job for the plaintiff, a job which plaintiff, by his own admission, would have accepted apart from the hours required, that is, a two-hour earlier start. (See Def.'s Mot. Summ. J. at Exh. D, p.79.) Plaintiff thus admits that the job itself, apart from the two-hour earlier start, reasonably accommodated his alleged disability--an admission one would assume given that this newly-created position was similar in nature to the position which plaintiff previously held

successfully for a number of years. Plaintiff contends, nonetheless, that this position offered by defendant did not constitute a reasonable accommodation because it required him to start work two hours earlier than his previous job.

The question then is whether plaintiff has produced sufficient evidence from which a factfinder could reasonably find that the defendant failed to reasonably accommodate plaintiff's alleged disability by requiring plaintiff to commence work at 5:30 a.m. The Court concludes that plaintiff has not. As mentioned previously, reasonable accommodations are "[m]odifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position." 29 C.F.R. § 1630.2(o)(1)(ii). Reasonable accommodations are therefore not accommodations based upon an individual's preferences, but upon those conditions which enable an individual to perform the essential functions of his position. Here, plaintiff, who bears the burden of proof, has failed to make a showing sufficient to establish that going to work at 7:30 a.m. as opposed to 5:30 a.m. enables him to perform the essential functions of his job. The only evidence offered by plaintiff is the after-the-fact deposition testimony of Dr. Singh who opines, months later, that getting up earlier at a time at which plaintiff was not accustomed "may or may not upset him" and could

"throw him off with pain." (Pl.'s Supp. at p.86.)¹ However, this information--even if assumed to be a competent medical evaluation--was not in defendant's possession at the time of its job offer to plaintiff. In a recent Fifth Circuit case, the Court addressed in dicta this precise issue and noted that where the employer was not in possession of information regarding the plaintiff's medical need for more time in the morning to get to work and where the plaintiff's physician indicated that plaintiff had no such limitations, the employer did not bear the burden of providing such an accommodation. See Hypes v. First Commerce Corp., 134 F.3d 721, 727 (5th Cir. 1998). Here, plaintiff's own treating physician, Dr. Singh, released plaintiff for full-time light duty work in March of 1996 with no further restrictions or limitations. (Def.'s Mot. Summ. J. at Exh D-3.) That release in particular contained no time restrictions of any kind.

In the opinion of this Court, it appears unreasonable, to say the least, to require an employer's "reasonable" accommodation to include accommodations for medical needs of which the employer has no competent knowledge and for which the employee has provided no substantiation. As in Hypes, defendant in the instant case was not in possession of any information--apart from plaintiff's own stated preferences--that plaintiff needed to be accommodated with respect to time to get ready for

¹ Although plaintiff submitted his Supplement, including Dr. Singh's deposition testimony, after the deadline imposed by this Court, the Court in its discretion takes it into consideration in determining the instant Motion.

work in the morning. Particularly in view of the history of defendant's reasonable accommodation of plaintiff's back pain, plaintiff is hard-pressed to argue that defendant's failure to provide plaintiff with an exact job of his liking, at the hours of his liking, constitutes discrimination prohibited by the ADA.

In his response, plaintiff contends that defendant's proffered position was not a bona fide offer but an offer which defendant intended that plaintiff not accept. To that end, plaintiff points to the deposition testimony of Linda Hess, a Vice President at Cardone, who testified, inter alia, that the job functions that would have been assigned to plaintiff in the position offered to him were both before and after performed by other employees at times other than the shift assigned to plaintiff. (See Pl.'s Resp. at Exh. 2, p.166.) Plaintiff argues that this evidence creates a question of fact as to the motivation for creating a job for plaintiff that commenced at 5:30 a.m. The Court cannot agree. The bare fact that in the midst of reorganization a company chose to combine certain job duties and assign that position to an earlier time shift is insufficient, in the opinion of this Court, to create a triable issue as to discriminatory animus. Moreover, it is uncontested by plaintiff that thirty or more employees of defendant work the 5:30 a.m. shift. Plaintiff was not singled out for an early-morning work shift. Plaintiff has failed to produce any evidence tending to show that defendant's motivation in creating and offering such a job to plaintiff was anything other than bona

fide, and certainly plaintiff has failed to produce any evidence showing discriminatory animus behind the offer. The Court thus finds that plaintiff has failed to create a genuine issue of material fact as to defendant's alleged discrimination in failing to reasonably accommodate his alleged disability and that therefore defendant is entitled to judgment as a matter of law.

D. Conclusion

Accordingly, defendant's Motion for Summary Judgment will be granted for the aforementioned reasons.

An appropriate Order follows.

Clarence C. Newcomer, J.

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O R D E R

AND NOW, this day of July, 1998, upon consideration of defendant's Motion for Summary Judgment, and plaintiff's response thereto, and consistent with the foregoing Memorandum, it is hereby ORDERED that said Motion is GRANTED. It is further ORDERED that JUDGMENT is hereby ENTERED in favor of defendant and against plaintiff.

AND IT IS SO ORDERED.

Clarence C. Newcomer, J.